

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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p. 15

75-1081

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

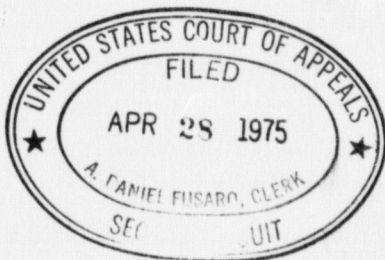
FERNANDO ECHEONA-MENDOZA,

Appellant.

Docket No. 75-1081

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
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MICHAEL YOUNG,
Of Counsel

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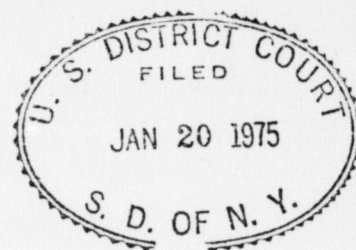
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| (07) | STATISTICAL RECORD | COSTS | DATE | NAME OR RECEIPT NO. | REC. | DISB. |
|------|--|------------|------|---------------------|------|-------|
| | J.S. 2 mailed | Clerk | | | | |
| | J.S. 3 mailed | Marshal | | | | |
| | Violation | Docket fee | | | | |
| | Title | | | | | |
| | Sec. | | | | | |
| | 1:846&963 Consp. to import & distr. Cocaine.(Ct.1) | | | | | |
| | 1:812,841(a)(1),(b). Distr. & possess. w/intent | | | | | |
| | o distr. Cocaine,11.(Ct.2) | | | | | |
| | (Two COunts) | | | | | |

| DATE | PROCEEDINGS |
|---------|--|
| 1-20-75 | Filed indictment. (Superseding 74Cr 1111 and referred to Owen,J.). |
| 1-22-75 | Deft. appears for trial. Court enters not guilty plea. Bail fixed at \$5,000.00 cash or surety. Deft. remanded in lieu of bail.....Owen,J. |
| 1-22-75 | Trial begun & continued. |
| 1-23-75 | Trial continued & adjourned until Jan.27th. |
| 1-27-75 | Trial continued. |
| 1-28-75 | Trial continued. Jury retires to deliberate. |
| 1-29-75 | Deliberations continue & concluded. Verdict - guilty on both counts. Pre-sentence investigation ordered. Sentence set for Mar.14th at 2:15 P.M. Deft. remanded.....Owen,J. |
| 2-3-75 | Filed deft's. request to charge. |
| 2-3-75 | Filed Govt's. requests to charge. |
| | Continued |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
UNITED STATES OF AMERICA, :

-v- :

FERNANDO ECHEONA-MENDOZA, :

Defendant. :

INDICTMENT

S. 75 Cr.

75 CRIM. 60

-----X
The Grand Jury charges:

1. From on or about the 1st day of September, 1973 and continuously thereafter up to and including on or about the 18th day of November, 1974, in the Southern District of New York, FERNANDO ECHEONA-MENDOZA, the defendant, and Raul Alvarez-Diaz, a/k/a "Roberto" a/k/a "Wilfredo", Roberto Albarracin-Gomez, a/k/a "Antonio Alvarez", and Rafael Vergara, named herein as co-conspirators but not as defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant and co-conspirators, unlawfully, intentionally, and knowingly would import into the United States from a place outside thereof quantities of cocaine, a Schedule II narcotic drug controlled substance, the exact amount thereof to the Grand Jury unknown, in violation of Sections 812, 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

3. It was further part of said conspiracy that the said defendant and co-conspirators, unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule II narcotic drug controlled substances, the exact amounts thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about November, 1973, the defendant FERNANDO ECHEONA-MENDOZA met with co-conspirators Raul Alvarez-Diaz, a/k/a "Roberto" a/k/a "Wilfredo" and Rafael Vergara at the Rio Bar in New York City.

2. In or about April, 1974 the defendant FERNANDO ECHEONA-MENDOZA received \$500 from co-conspirator Raul Alvarez-Diaz, a/k/a "Roberto" a/k/a "Wilfredo".

3. In or about November, 1974, the defendant FERNANDO ECHEONA-MENDOZA had a telephone conversation with co-conspirator Raul Alvarez-Diaz, a/k/a "Roberto" a/k/a "Wilfredo".

4. On or about November 16, 1974, co-conspirator Roberto Albarracin-Gomez, a/k/a "Antonio Alvarez", arrived by plane in Miami, Florida in possession of approximately 315 grams of cocaine.

5. On or about November 17, 1974, co-conspirator Roberto Albarracin-Gomez, a/k/a "Antonio Alvarez", delivered a quantity of cocaine to co-conspirator Raul Alvarez-Diaz, a/k/a "Roberto" a/k/a "Wilfredo" at the Holiday Inn, West 57th Street, New York, New York.

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d-720

6. On or about November 17, 1974, the defendant FERNANDO ECHEONA-MENDOZA had a telephone conversation with co-conspirator Raul Alvarez-Diaz, a/k/a "Roberto", a/k/a "Wilfredo."

7. On or about November 17, 1974, the defendant FERNANDO ECHEONA-MENDOZA received a quantity of cocaine from co-conspirator Raul Alvarez-Diaz, a/k/a "Roberto" a/k/a "Wilfredo", in the vicinity of 571 West 139th Street, New York, New York.

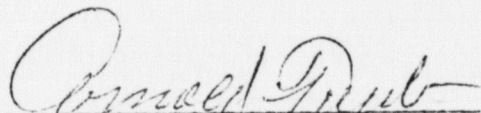
(Title 21, United States Code, Sections 846 and 963).

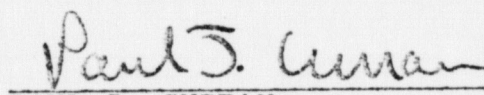
SECOND COUNT

The Grand Jury further charges:

On or about the 17th day of November, 1974, in the Southern District of New York, FERNANDO ECHEONA-MENDOZA, the defendant, unlawfully, intentionally and knowingly did attempt to and did possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately a kilogram of cocaine.

(Title 21, United States Code, Section 812, 841(a)(1), 841(b)(1)(A) and 846.)


FOREMAN


PAUL J. CURRAN
United States Attorney

JAN 22 1975 DEPT. ATTORNEYS FOR STATE. COURT ENTERS N/E PLCT. BAIL
FIXED AT 5,000.00 CASH OR SURETY. DEPT. REMAND IN LIEU OF B.

JAN 23 1975 - TRIAL BEGUN & CONTINUED. OWEN, J.

JAN 23 1975 - TRIAL CONTINUED & ADJ. UNTIL JAN 27TH

JAN 24 1975 - TRIAL CONT'D.

JAN 25 1975 - TRIAL CONT'D - JURY RETIRES TO DELIBERATE

JAN 26 1975 - DELIBERATIONS CONTINUE & CONCLUDED.

VERDICT - GUILTY ON BOTH COUNTS. P.S. I ORDERED
SENTENCE BE HEARD AT 2ND PM. DEPT. REMAND.

OWEN, J.
R

JAN 27 1975 - DEPT. MEENOOZA PRESENT FOR SENTENCES.

4 YRS. IN PRISON ON GA. COUNT. TO RUN CONCURRENTLY TO GA. OTHER.

3 YRS. SPECIAL PAROLE ON GA. CT. TO RUN CONCURRENTLY TO GA. OTHER.

DEPT. GIVEN CREDIT FOR TIME SERVED. ~~STATE COURT~~ DEPT. REMAND.

OWEN, J.

CRIM. 60

JUDGE OWEN

Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

FERNANDO ECHEONA-MENDOZA,

Defendant.

INDICTMENT

S 75 Cr.

(In violation of Title 21, U.S.C.
§§ 846, 903, 812, 841(a)(1) and
841(b)(1)(A).)

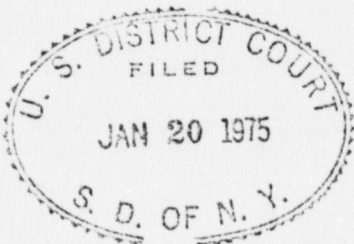
PAUL J. CURRAN

United States Attorney.

A TRUE BILL

Arnold Paul
Foreman.

FPI-SS-2-19-71-20M-6950



CHARGE OF THE COURT

THE COURT: Now ladies and gentlemen, I will have to apologize for the quality of my voice today, too, but I'm sure you will all be able to hear me.

Mr. Foreman, ladies and gentlemen of the jury: We are now at the point in this trial where you are soon to undertake your final function as jurors, and it is here that you will perform what I have earlier said is one of the most valuable and important obligations of citizenship, that is, you are to act in this case as ministers of justice and to determine here in accordance with these instructions what the facts are in this case.

You are to do this and to discharge this duty with complete fairness and complete impartiality, and as I said when you were selected, you are to do it without bias or prejudice for or against the Government or for or against the defendant as parties to this case.

The fact that the Government is a party here entitles it to no greater consideration than that accorded to any other party in any litigation. By the same token, it is entitled to no less consideration. All parties, whether it's the Government, individuals, corporations or whatever, stand alike as equals before the bar of justice.

Now, in your final role here, in passing upon the

fact issues, you are the sole and exclusive judges of those facts. That is not in my province. You determine the weight of the evidence, you appraise the credibility or believability of the witnesses, you draw the reasonable inferences from the evidence you think are warranted, you resolve such conflicts as you may find exist in the evidence, and in doing this, I will later refer to how you can be assisted in determining these issues and in determining any questions of credibility that you may find.

My final function as the Court in this case is to instruct you on the law, and it is your duty to accept these instructions and to apply them to the facts as you may find them.

With respect to any fact matter, it is your recollection and your recollection alone that governs as to what the testimony was.

As I have already said, anything that any attorney in this case has said with respect to any testimony, whether during the trial, in a question, in an argument, or in summations, is not to be substituted for your own recollection of the evidence.

So, too, anything that I may have said or may have referred to during the course of these instructions regarding any matter of evidence or testimony is not to be taken in

lieu of your own recollection of what that testimony was.

If you wish to consider any exhibit in this case, you have only to ask for it and it will be made available.

Now, before we consider the precise charges here, let me note a few preliminary things.

As you have heard, this indictment contains two separate charges against the defendant. The first is a conspiracy charge charging that he, together with others, conspired to violate the federal laws prohibiting illegal importation of narcotics or illegal distribution of narcotics or possession with intent to distribute such narcotics.

The second count charges him and certain other persons not before you with an actual violation of the law. We call that a substantive count. The charge is possession with intent to distribute a narcotic drug.

As you heard during the trial, Raul Alvarez-Diaz, whom we have known here as Roberto on certain occasions, a named co-conspirator, has entered a plea of guilty to these charges.

Now, Roberto Albarracin has also, in Miami, pleaded guilty to a charge of participation in this importation of narcotics.

They are not on trial before you. You are here only concerned with the guilt or innocence of Mr. Echeona.

2 The fact that others have pleaded guilty may not be con-
3 sidered against Mr. Echeona in any way nor may any adverse
4 inference be drawn against him by reason of that.

5 These pleas are not to be considered as evidence
6 against Mr. Echeona, but the fact that others have pleaded
7 guilty, those who were witnesses here, may be considered by
8 you on the issue of the credibility of such person who has
9 taken a plea. I will give you some instructions on that a
10 little bit later.

11 At the heart of everything I am saying here in this
12 area is that guilt is a personal thing. The guilt or inno-
13 cence of Mr. Echeona here on trial must be determined by you
14 solely upon the evidence presented against him, or the lack
15 of evidence as the case may be, if you find that is relevant.

16 The charges against Mr. Echeona will stand or fall
17 on the proof or the lack of proof against him and not upon
18 the proof against any co-conspirator or anybody else.

19 Now there are certain essential principles of law
20 which apply in every criminal case, and I made reference to
21 some of them at the time of your selection. I will repeat
22 them now.

23 The indictment, this piece of paper, these pieces
24 of paper that I am holding here, constitutes merely a charge.
25 The indictment is no evidence or proof of the defendant's

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2 guilt and no weight whatever is to be given to the fact that
3 an indictment has been returned against this defendant. He
4 has pleaded not guilty to these charges. That puts the
5 burden upon the Government of proving these charges against
6 him beyond a reasonable doubt.

7
8 The defendant does not have to prove his innocence.
9 On the contrary, he is presumed to be innocent of the charges
10 contained in this indictment. This presumption of innocence
11 was in his favor at the start of the trial, it continues in
12 his favor throughout the entire trial, it is in his favor as
13 I instruct you even at this moment, and it remains in his
14 favor during the course of your deliberations in the jury
15 room.

16 The presumption of innocence is removed only if
17 and only when you are satisfied that the Government has
18 sustained its burden of proving the guilt of the defendant
19 beyond a reasonable doubt.

20 Now the question that arises is, what is a
21 reasonable doubt? The words almost define themselves; that
22 there is a doubt founded in reason and arising out of the
23 evidence in the case or the lack of evidence.

24 It is a doubt which a reasonable person has after
25 carefully weighing all the evidence. A reasonable doubt is
 a doubt that applies to your reason, your judgment, your

common sense, and your experience. It is not caprice, whim, speculation, guess, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for the defendant.

If, after fair and impartial consideration as a result of the evidence you can candidly and honestly say that you are not satisfied of the guilt of the defendant, that you do not have abiding conviction of the defendant's guilt, in sum, if you have such a doubt as would cause a prudent person to hesitate before acting in matters of importance to yourself, then you have a reasonable doubt. In that circumstance it is your duty to acquit.

If, on the other hand, after such impartial and fair consideration of all the evidence you can candidly and honestly say that you do have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and under such circumstance, it is your duty to convict.

One final word on this subject: A reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty, would be convicted. It is practically impossible for a person to be absolutely and completely convinced of any

2 controvertible fact which, by its nature, is not susceptible
3 of mathematical certainty.

4 As a consequence, the law in a criminal case is
5 that it is sufficient that the guilt of the defendant is
6 established beyond a reasonable doubt, not beyond all
7 possible doubt.

8 Now, as we know, the indictment charges the
9 defendant with having committed two different crimes. One,
10 the crime of conspiracy to violate the narcotics laws, the
11 other an actual violation of the law, as we call it, the
12 substantive count.

13 The conspiracy count in the indictment reads as
14 follows:

15 From on or about the 1st day of September, 1973,
16 and continuously thereafter up to and including on or about
17 the 18th day of November, 1974, in the Southern District of
18 New York, Fernando Echeona-Mendoza, the defendant, and Raul
19 Alvarez-Diaz, also known as Roberto, also known as Wilfredo,
20 Roberto Albarracin-Gomez, also known as Antonio Alvarez, and
21 Rafael Vergara, named herein as co-conspirators but not as
22 defendants, and others to the grand jury unknown, unlawfully,
23 intentionally and knowingly combined, conspired, confederated
24 and agreed together and with each other to violate Sections
25 812, and it lists a number of other sections of the United

States Code.

2. It was part of said conspiracy that the said defendant and co-conspirators unlawfully, intentionally and knowingly would import into the United States from a place outside thereof quantities of cocaine, a Schedule 2 narcotic drug controlled substance, the exact amount thereof to the grand jury unknown, and in violation of Sections 812, and a number of other sections of the United States Code.

And you are of course free to ask for a copy of this indictment for your study and the figures are in there. I do not feel they are relevant to the reading to you of these exact charges.

3. It was further part of said conspiracy that the said defendant and co-conspirators unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule 2 narcotic drug controlled substance, the exact amounts thereof being to the grand jury unknown, in violation of Sections 812, and other sections of the United States Code.

The essence of the crime of conspiracy is an agreement or understanding to violate our laws. Thus, if a conspiracy exists, even though it should fail of its purpose, it is still punishable as a crime.

A conspiracy, which sometimes is referred to as a

partnership in crime, because it involves collective or organized action, presents a greater potential threat to the public interest than the illicit activity of a single person.

Group association or organized activity renders detection more difficult than in the instance of a single wrongdoer. Also because in numbers there is strength, and two or more people are able to accomplish crimes more difficult or harmful than a single individual on his own.

It is for these reasons and other reasons that Congress made conspiracy or concerted action to violate federal law a crime, entirely separate, distinct and different from the violation of the law or laws which may have been the objective of the conspiracy.

Thus, Congress has enacted a special law which provides that any person who conspires to violate the Drug Abuse Prevention Control Act, a part of which law is incidentally the subject of the substantive count, shall be guilty of a separate crime.

The Drug Abuse and Control Act which it is charged that this defendant and others conspired to violate, and the actual violation which is charged in the substantive crime reads in relative part as follows:

I will now read to you from the statute. "It shall be unlawful for any person knowingly or intentionally to

2 distribute or possess with intent to distribute a controlled
3 substance."

4 Another section of the same act provides:

5 "It shall be unlawful to import into the United
6 States from any place outside thereof any controlled sub-
7 stance in Schedule 2."

8 Now, I charge you that under another section of the
9 law cocaine is a controlled substance listed in Schedule 2.

10 Against this background of the applicable statutes,
11 let us turn to a consideration of the specific counts of the
12 indictment, and I want to emphasize that the defendant is not
13 on trial on any charges other than those contained in this
14 indictment.

15 Now, in order to convict, ladies and gentlemen, in
16 order to convict Mr. Echeona on Count 1, the conspiracy
17 count, the Government must prove beyond a reasonable doubt
18 the following essential elements:

19 1. The existence of the conspiracy charged in the
20 indictment. That is, a conspiracy to import and/or to
21 distribute and possess with intent to distribute narcotic
22 drugs.

23 2. That Mr. Echeona knowingly joined or associated
24 himself with the conspiracy aware of its unlawful purpose.

25 3. That one of the alleged conspirators, whether

Mr. Echeona or any other, committed at least one of the overt acts, as to which I will tell you more later, set forth in the indictment in the Southern District of New York, such overt act being in furtherance of the conspiracy.

Now, let us take the first of these three elements. What is a conspiracy? The idea is simple. It is a combination, agreement or understanding of two or more persons by concerted action to accomplish a criminal or unlawful purpose.

In this case, it is charged that the illegal purpose was to import and/or to distribute and possess with intent to distribute a narcotic drug.

The Government has offered proof here that discussion was had in the course of this conspiracy with regard to the importation and distribution of cocaine.

Now the gist of the crime is the unlawful combination or agreement to violate the law. The success or failure of the conspiracy is immaterial on the question of guilt or innocence of a co-conspirator.

For example, if you find that this conspiracy existed but that the transaction which the Government alleges was in progress in November 1974 was intercepted before money was paid, that is of no consequence to a finding of conspiracy.

To establish a conspiracy, the Government is not

required to show that two or more persons sat around a table and entered into a formal partnership agreement either orally or in writing.

Common sense will tell you that when persons in fact undertake to enter into a criminal agreement, much is left to unexpressed understanding. The very nature of a conspiracy calls for secrecy.

What the evidence must show in order to establish that a conspiracy existed is that its alleged members in some way, through some contrivance, impliedly or tacitly, came to a common understanding knowingly and intentionally to distribute or possess with intent to distribute a narcotic drug under Schedule 2.

In determining, ladies and gentlemen, whether there has been an unlawful agreement or understanding, you may judge the acts and conduct of the alleged co-conspirators which are done to carry out the apparent criminal purpose. The old adage, "Actions speak louder than words," is applicable here.

Usually, the only evidence available is that of the disconnected acts and conduct on the part of the alleged individual conspirators which acts and conduct, however, when taken together, in connection with each other, and considered as a whole, permit an inference that a conspiracy

existed as conclusively as if it were direct proof.

Conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the act of each other member. To become a member of a conspiracy a defendant need not know all the other members or participants nor all the details of the conspiracy. Each member may perform separate and distinct acts at different times, some playing major roles while others play minor roles.

You must first determine whether the proof establishes the existence of the conspiracy charged in the indictment. If you find that it existed, it is not essential that the Government prove that it began or ended on a specific date set forth in the indictment. It is sufficient if you find that in fact a conspiracy was formed and existed for some time within the period set forth in the indictment which is between September 1, 1973 and 18 November, 1974, and that at least one of the overt acts was committed in furtherance of that conspiracy during the period charged.

In deciding, therefore, this first element you should consider all of the evidence, direct and circumstantial, which has been admitted with respect to the conduct, acts, declarations of each alleged co-conspirator and such inferences as you may reasonably draw from those.

It is sufficient to establish the existence of the

2 conspiracy if, from the proof of all the relevant facts and
3 circumstances you find beyond a reasonable doubt that the
4 minds of at least two alleged conspirators met in an under-
5 standing way to accomplish by the means charged one or more
6 objects of the conspiracy as charged in the indictment.

7 You must next decide, then, the second element.
8 You will recall that this requires the Government to estab-
9 lish that Mr. Echeona became a part of the conspiracy with
10 knowledge of its unlawful purpose. His participation in it,
11 if you find one did exist, must be established by the inde-
12 pendent evidence of his own acts, statements and conduct as
13 well as those of other conspirators and/or the reasonable
14 inferences to be drawn therefrom.

15 To find the defendant guilty of the conspiracy
16 here, then as to this element you must find beyond a reason-
17 able doubt, being aware of its existence and its purposes,
18 he was a willing and knowing participant joining with others
19 in the intent to advance its purposes.

20 If you do so find, then, however limited or what-
21 ever his role was in furthering it, he is equally culpable
22 with those having more extensive participation. In addition,
23 he is responsible for all that was done by his co-conspirators
24 in furtherance of the conspiracy during its continuance.

25 Once you are satisfied beyond a reasonable doubt

1 that there was a conspiracy, and that Mr. Echeona was a
2 member of it, then the acts and declarations of any other
3 person found by you to be a member of the conspiracy, made
4 during its existence and in furtherance of its objectives,
5 are considered the acts and declarations of all, even though
6 an individual member may not have been present at the time.
7

8 For example, assuming that you find the conspiracy
9 as charged existed, of which Raul Alvarez-Diaz, Roberto
10 Albarracin-Gomez, and Rafael Vergara were members, then
11 their acts and statements in furtherance of the conspiracy,
12 if you so find, would be binding upon Mr. Echeona, assuming
13 you find him to be a member even though he was not present
14 on the occasions when those acts and statements were made.

15 Now, a footnote to this. Evidence was admitted
16 by me as the Court as to conversations that Raul Alvarez-Diaz
17 and Roberto Albarracin-Gomez had with federal agents after
18 their respective arrests.

19 Obviously these were not in furtherance of the
20 conspiracy. These conversations were admitted only for the
21 purpose of showing the circumstances under which later events
22 occurred.

23 These conversations are therefore not binding on
24 the defendant, under my earlier instruction, and are not
25 proof or evidence against him of any kind whatsoever with

regard to his participation in the conspiracy or its existence and is not to be considered as such by you in any way.

Summing it up, if in fact there was a partnership in crime, each partner acts and speaks for the other in furtherance of the partnership business even though he may not have been present. When joining such a venture, he assumes all of its liabilities.

Now, the existence of a conspiracy and one's membership therein may be or may not be establishable by direct evidence or by circumstantial evidence, but it must be established by one or the other or both.

Circumstantial evidence, if I can use a homely example that judges in this court have used for a long time, is as follows:

Let us suppose that the blinds were drawn and you could not see out of this room. You come in after lunch, it having been a beautiful sunny day, and as the afternoon wears on, you see a person come in wearing a raincoat and shaking the water off his shoulders. You then see another person coming in with an umbrella from which he shakes the drops of water and hangs it up in the coat rack.

Those facts would enable you, would warrant you concluding that since you came in from lunch the sun had stopped shining and it was raining.

1 It is as simple as that. And that is what is
2
3 meant by circumstantial evidence; proof of a fact from which
4 another fact can reasonably be inferred.

5 Now here the Government contends that there was
6 both kinds of evidence, both direct evidence and circumstan-
7 tial evidence. Often it is the case that conspiracies are
8 establishable only as a matter of reasonable inference based
9 upon circumstantial evidence.

10 You will note that I have said that one of the
11 elements of the crime that you must find beyond a reasonable
12 doubt is that Mr. Echeona acted knowingly, willfully and
13 intentionally.

14 This simply means that he knew what he was doing,
15 that he acted voluntarily, deliberately and purposely in
16 carrying out the purposes of the conspiracy, and not that he
17 acted because of mistake, accident, carelessness, inadver-
18 tence, ignorance or some innocent reason.

19 Whether Mr. Echeona knowingly and intentionally
20 participated in the claimed conspiracy presents an issue of
21 fact. Clearly, this concerns what is going on in a person's
22 mind.

23 Medical science has not yet devised an instrument
24 whereby we can go back in time and determine what at that
25 time was a person's intent or knowledge. Consequently, these

may be determined from one's acts, conduct, surrounding circumstances, and such inferences as you reasonably draw from them.

A word of caution, however: Mere association of a defendant with an alleged conspirator or conspirators does not establish the defendant's participation in the conspiracy even if you find that one existed; nor is knowledge of or presence at the commission of a narcotics transaction without more sufficient to make a person a co-conspirator.

If you find that the Government has sustained the element as to Mr. Echeona's participation in the conspiracy, we then reach the next element, the third element.

I have already mentioned that that third essential element of the crime is an overt act intended to effect the object of the conspiracy, and must be one committed by at least one of the co-conspirators after the unlawful agreement has been made.

The reason the law of conspiracy requires an overt act is because a person might agree to commit a crime against the United States and then change his mind. In such a case there would be no crime.

An overt act, as to which I am sure you are inquiring, is any step, action or conduct, which is taken or caused to be taken by any member of the conspiracy to

1 achieve, accomplish, or further the objectives of the
2 conspiracy.
3

4 The overt act need be neither a criminal act nor
5 the very crime which is the object of the conspiracy, but it
6 must be one that furthers it. Thus, in this case the seven
7 overt acts listed in the indictment are as follows, and I
8 will read them to you:

9 "In pursuance of the said conspiracy, and to effect
10 the objects thereof, the following overt acts were committed
11 in the Southern District of New York and elsewhere:"

12 And while I am about it, I charge you that the
13 Southern District of New York includes the Island of
14 Manhattan, and the Bronx, and other counties not relevant
15 to us north of the Bronx.

16 "Overt Act 1. In or about November 1973 the
17 defendant, Fernando Echeona-Mendoza, met with co-conspirators
18 Raul Alvarez-Diaz, also known as Roberto, also known as
19 Wilfredo, and Rafael Vergara at the Rio Bar in New York City."

20 "2. In or about April 1974 the defendant, Fernando
21 Echeona-Mendoza, received \$500 from co-conspirator Raul
22 Alvarez-Diaz, also known as Roberto, also known as Wilfredo.

23 "3. In or about November 1974 the defendant,
24 Fernando Echeona-Mendoza, had a telephone conversation with
25 co-conspirator Raul Alvarez-Diaz, also known as Roberto, also

known as Wilfredo.

"4. On or about November 16, 1974 co-conspirator Roberto Albarracin-Gomez, also known as Antonio Alvarez, arrived by plane in Miami, Florida, in possession of approximately 315 grams of cocaine.

"5. On or about November 17, 1974, co-conspirator Roberto Albarracin-Gomez, also known as Antonio Alvarez, delivered a quantity of cocaine to co-conspirator Raul Alvarez-Diaz, at the Holiday Inn, West 57th Street, New York, N.Y.

"6. On or about November 17, 1974 defendant Fernando Echeona-Mendoza had a telephone conversation with co-conspirator Raul Alvarez-Diaz, also known as Roberto.

"7. On or about November 17, 1974 defendant Fernando Echeona-Mendoza received a quantity of cocaine from co-conspirator Raul Alvarez-Diaz, also known as Roberto, in the vicinity of 571 West 139th Street in New York, N.Y."

Now obviously for people to engage in conversations or to have meetings is not necessarily in and of itself criminal conduct, but if, as the Government charges, the purpose of the conversations or the meetings was to expedite or further the importation and distribution of narcotics, then these conversations or meetings no longer have an

innocent character and become overt acts to further the purpose of an illegal enterprise.

Now, it is not necessary for the Government to prove that each member of the conspiracy committed or participated in any particular overt act since the act of any one of the members done in furtherance of the conspiracy becomes the act of all the other members.

Also, the Government is not required to prove each of the overt acts. It is sufficient if it proves beyond a reasonable doubt the commission of at least one of the acts in the Southern District of New York at or about the time alleged.

With these general principles as a guide, you will then consider whether the Government has, by the required degree of proof, established the essential elements of the conspiracy.

If you find that the Government has failed to prove beyond a reasonable doubt any element of the crime of conspiracy, then you must acquit the defendant on that charge.

If, on the other hand, you find that the Government has proved beyond a reasonable doubt that the conspiracy did exist as alleged, that its purpose was knowingly and intentionally to import or distribute and possess with intent to distribute a Schedule 2 narcotic drug or both, that the

defendant became a member of the conspiracy knowingly, aware of its unlawful purpose, and finally that any one of the co-conspirators committed at least one overt act charged in the indictment in furtherance of the conspiracy in the Southern District of New York, then you have sufficient evidence upon which to convict the defendant.

Now, let us turn to the substantive charge. The indictment on that charge reads as follows:

"On or about the 17th day of November, 1974 in the Southern District of New York, Fernando Echeona-Mendoza, the defendant, unlawfully, intentionally and knowingly did attempt to and did possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, approximately a kilogram of cocaine."

I have already read to you the law upon which this substantive violation is based, but it is perhaps appropriate to read it to you again. It is very short.

"It shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a controlled substance."

In order to find Mr. Echeona guilty under this count, the Government must establish beyond a reasonable doubt the following elements:

First, that on or about November 17, 1974 he

possessed with intent to distribute a narcotic drug controlled substance.

Second, that he did so unlawfully, willfully and knowingly. This means that he had the narcotic drug in his possession deliberately and purposely aware that he had it, that he knew what he was doing and that such possession was not due to inadvertence, negligence, or mistake, or ignorance, that he possessed it in the Southern District of New York.

The third element is that the substance in Government Exhibit 1 was in fact cocaine which are Government Exhibits 7 and 8, one of the smaller of the two packages, Government Exhibit 7 was in fact cocaine, which, if you so find, as I charged you, is a narcotic drug controlled substance.

You will recall in this connection that the proof that the Government offered was that in Miami the 300 odd grams of cocaine had been broken down into two packages, one that was retained and one that was sent on. The one that was sent on had most of the cocaine removed and substituted for it was lactose. That was the Government's proof on that score.

And it was this package, the Government contends, which was given first to Roberto and then was in the car at the time of the arrest of the defendant.

2 Now, a word about the definition of "possess"
3 which the statute uses. To possess something means to have
4 it within one's control.

5 Possession may be of two types: Either actual or
6 constructive. Actual possession means that the defendant
7 knowingly had personal, manual, or physical control of the
8 narcotics. Constructive possession means that although the
9 narcotics are in the physical possession of another person,
10 the defendant knowingly had the power to exercise control
11 over them or their distribution, or to set the price for
12 their sale, or to cause their delivery, or to guarantee
13 quality.

14 The word "distribute" means "to transfer." Either
15 type of possession may be proved by direct or circumstantial
16 evidence, or by a combination of both.

17 Here the proof was offered by the Government tend-
18 ing to show actual and constructive possession. I want to
19 repeat, this is the Government's contention in this case,
20 which is denied and is disputed by the defendant. You must
21 resolve this fact issue.

22 As to the third element, the indictment charges
23 that the narcotic drug is cocaine. I have instructed you
24 as a matter of law that cocaine is a narcotic drug controlled
25 substance. You, however, must still find beyond a reasonable

doubt whether the substance in evidence was cocaine.

With respect to the substance in evidence here which the Government claims was seized from the car in which Mr. Echeona was seated, you have heard testimony that while some of the substance was cocaine, most of it was a non-narcotic drug substitute, and the substitution, according to some evidence that you have heard, was that when Roberto Albarracin was arrested in Miami and the cocaine was seized from him, he agreed to cooperate with the agents and deliver it to Raul Alvarez-Diaz, and it's claimed that the agents removed much of the cocaine and made the substitution to arrive at a quantity, which according to the Government, Alvarez and Echeona were expecting.

Now due to this substitution, Count 2 of the indictment charges Mr. Echeona with the attempted possession of a kilogram of cocaine. The reason that Echeona is charged with the attempt is because of the fact that much of the cocaine was taken or substituted before it reached him.

I instruct you that the Government carries its burden of proof on this charge of attempt if it proves beyond a reasonable doubt that Echeona's actions would have constituted the completed crime if the surrounding circumstances were as he believed them to be. In other words, if you find that Mr. Echeona believed that he was in possession of a

1 eblm

445

2 kilogram of cocaine, then he is guilty of attempt.

3 Now, I shall not review the testimony for you since
4 this was a short case and counsel have done it very well.
5 Nor will I restate the contentions of the parties since
6 counsel on both sides have done that well for you also.

7 I have not referred to all of the evidence upon
8 which the parties rely, but I want to say firmly that all
9 evidence, whether or not I refer to it, is important and
10 should be considered by you.

11 The fact that I have not attempted to review the
12 testimony of all of the witnesses, or my not commenting on
13 any part of the evidence is no indication that these have
14 been disregarded by me or that I am placing a special
15 emphasis on any testimony that I have called to your atten-
16 tion in this charge.

17 You may not assume and shall not assume and I do
18 not have any view as to the credibility of witnesses or how
19 the issues are to be decided. That is solely your function
20 as triers of the fact.

21 I want to repeat again, it is your recollection and
22 yours alone of the testimony that governs.

23 I also want to state that just because evidence is
24 uncontradicted in the record, you need not accept it if you
25 do not find it to be believable. You alone are called upon

to decide the fact issues.

Now how do you do this? Your determination of the issue of credibility very largely depends upon the impression that a witness or witnesses made upon you. Was he or she telling the truth or giving you an accurate version of what happened?

As I have said to you, and I have been reminded that I have said it to you, when you walk in the door of this courtroom and sit in the jury box while the trial is going on and while you are deliberating, you keep your common sense, your good judgment, and your experience with you.

You decide whether a witness has told a straightforward and truthful story, whether he attempted to conceal anything, whether there was a motive to testify falsely, whether there is any reason why he might color his testimony.

The ultimate question for you to decide in passing upon credibility is, did the witness tell the truth here before you as to essential material matters?

It is for you to say whether a witness at this trial is truthful in whole or in part in light of his or her demeanor -- that is his or her manner of testifying -- and all the evidence in the case.

The fact that certain witnesses were Government

employees does not entitle their testimony to any greater weight or consideration than that accorded to any other witness in this case, nor does it entitle them to any lesser weight or consideration. You evaluate their credibility the same way you do that of any other witness.

Now, Mr. Raul Alvarez-Diaz, also known as Roberto, and Mr. Roberto Albarracin-Gomez, also known as Antonio Alvarez, who testified to a substantial extent here and upon whom the Government relies, each assert that he was a participant in the conspiracy alleged in the indictment.

There is no requirement in the federal courts that the testimony of a self-proclaimed accomplice be corroborated. A conviction may rest on the uncorroborated testimony of such a person if you find it credible and believable. That a witness asserts he is an accomplice may be considered by you as bearing upon his credibility and upon his believability.

Accomplice testimony implicating a defendant as a perpetrator of a crime is to be treated as suspect. However, it does not follow that just because a person asserts participation in a crime that he is not capable of giving a truthful version of what happened.

His testimony, however, should be viewed with great caution and scrutinized carefully. Did any alleged co-conspirator here give false testimony or color testimony

2 contrary to fact, hopeful that his testimony would result in
3 favorable treatment as to his sentence or in any other way,
4 or did these witnesses or either of them make a clean breast
5 of wrongdoing and tell the truth as to significant matters?
6 That is your question.

7 If you find, ladies and gentlemen, that any witness,
8 and this applies to all witnesses, has willfully testified
9 falsely as to any material matter, you may reject the entire
10 testimony of that witness, or you may accept such part as
11 commends itself to your belief or which you may find corrob-
12 orated by other evidence in the case.

13 Now, the law permits but does not require a
14 defendant to testify in his own behalf. Mr. Echeona has
15 taken the witness stand.

16 Obviously he has a deep, personal interest in the
17 result of this prosecution. Indeed, it is fair to say that
18 he has the greatest stake in its outcome.

19 Interest creates a motive for false testimony. The
20 greater the interest, the stronger the motive, and a defen-
21 dant's interest in the result of his trial is of a character
22 possessed by no other witness.

23 In appraising his credibility, you may take that
24 fact into consideration. However, and I say this equally
25 strongly, it by no means follows that simply because a person

has a vital interest in the end result, that he is not capable of telling a truthful, candid and straightforward statement.

It is for you to decide to what extent, if at all, his interest has affected or colored his testimony.

If you find that the defendant, going on to another subject, when questioned by anyone, gave a false statement in an attempt to exculpate or exonerate himself, you may consider such false statement as circumstantial evidence from which consciousness of guilt or criminal intent may be inferred, for it's reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's explanation or statement points to a consciousness of guilt and the significance, if any, to be attached to any such evidence are matters for determination solely by you.

The Government, to prevail, must prove, with respect to each count, the essential elements by the required degree of proof, as I have already explained it to you.

If it succeeds as to any particular count, your verdict should be guilty. If it fails, your verdict must be not guilty.

You must consider each count separately and render

a separate verdict as to each count. Thus, you may render a verdict of guilty on both counts, or not guilty on both counts, or guilty on one and not guilty on the other as the case may be.

Your verdict with respect to each count must be unanimous. You function, as I have said before, but I need to repeat it as a foundation for what I want to say, your function in this case is to weigh the evidence and to determine the guilt or innocence of Mr. Echeona solely on the basis of the evidence in this case and these instructions on the law.

Under your oath as jurors you may not allow, you cannot allow a consideration of the sentence which may be imposed upon a defendant if he is convicted to enter into your deliberations or to influence your verdict in any way. Your duty is to decide the case solely and only upon the evidence. In the event of a conviction, the duty of imposing sentence rests solely with the Court.

Each juror is entitled to his or her own opinion, but each should, however, exchange views with fellow jurors. That is the very purpose of jury deliberation, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, to consult with one another and to reach an agreement based solely and

wholly on the evidence if you can do so without violence to your individual judgment.

Each must decide the case for himself or herself after consideration and discussion with his or her fellow jurors, but you should not hesitate to change an opinion which, after discussion with your fellow jurors, appears erroneous.

However equally, if, after carefully considering all the evidence, the arguments of your fellow jurors, if you then entertain a conscientious view which differs from the others, you are not to yield your convictions simply because you are outnumbered or outweighed.

The final vote must reflect your conscientious conviction as to how the issues should be decided. The charge here is a serious charge, and the just determination of this case is important both to the public and to the defendant.

Under your oaths as jurors you must decide this case without fear or favor. If the Government has failed to carry its burden, your duty is to acquit. If the Government has carried its burden, you must not flinch from your sworn duty but you must convict.

Ladies and gentlemen, that concludes my charge on the law.

Do counsel wish to meet with me in the robing room on any matter? Mr. Curley?

MR. CURLEY: Yes, your Honor.

THE COURT: All right. If you will, stay in place for a moment, please.

(In the robing room.)

THE COURT: Requests or exceptions?

MR. CURLEY: No requests, your Honor. I have one or two exceptions.

I think as a matter of course I object to the part of the definition of conspiracy dealing with the greater threat to the community involved in a crime of conspiracy and the role of Congress.

I know the Government submits these as a matter of course and defense counsel always object, and I do it at this time.

THE COURT: I note your objection, and an exception.

MR. CURLEY: I object to the Court's charges as to the interest of the defendant as a witness.

Again, I know the substance of what the Government submitted, and it is basically the same as your Honor has charged, but again, as defense counsel, I object to it.

THE COURT: Very good. Exception noted.

MR. CURLEY: And I guess I would have preferred

2 the words that I requested in United States against Pagent
3 with respect to accomplice testimony, but I think your
4 Honor's charge covers it as well.

5 That's it.

6 THE COURT: Mr. Kaufman, anything?

7 MR. KAUFMAN: Nothing, your Honor.

8 THE COURT: Very good.

9 (In open court.)

10 THE COURT: At this point it is my duty as the
11 Judge here to excuse the two alternates with my thanks.
12 Thank you very much for your service.

13 (Two alternate jurors discharged.)

14 THE COURT: Swear the marshal.

15 (The marshal was duly sworn.)

16 THE COURT: Ladies and gentlemen, you may retire.

17 (The jury retired to deliberate upon a verdict.)

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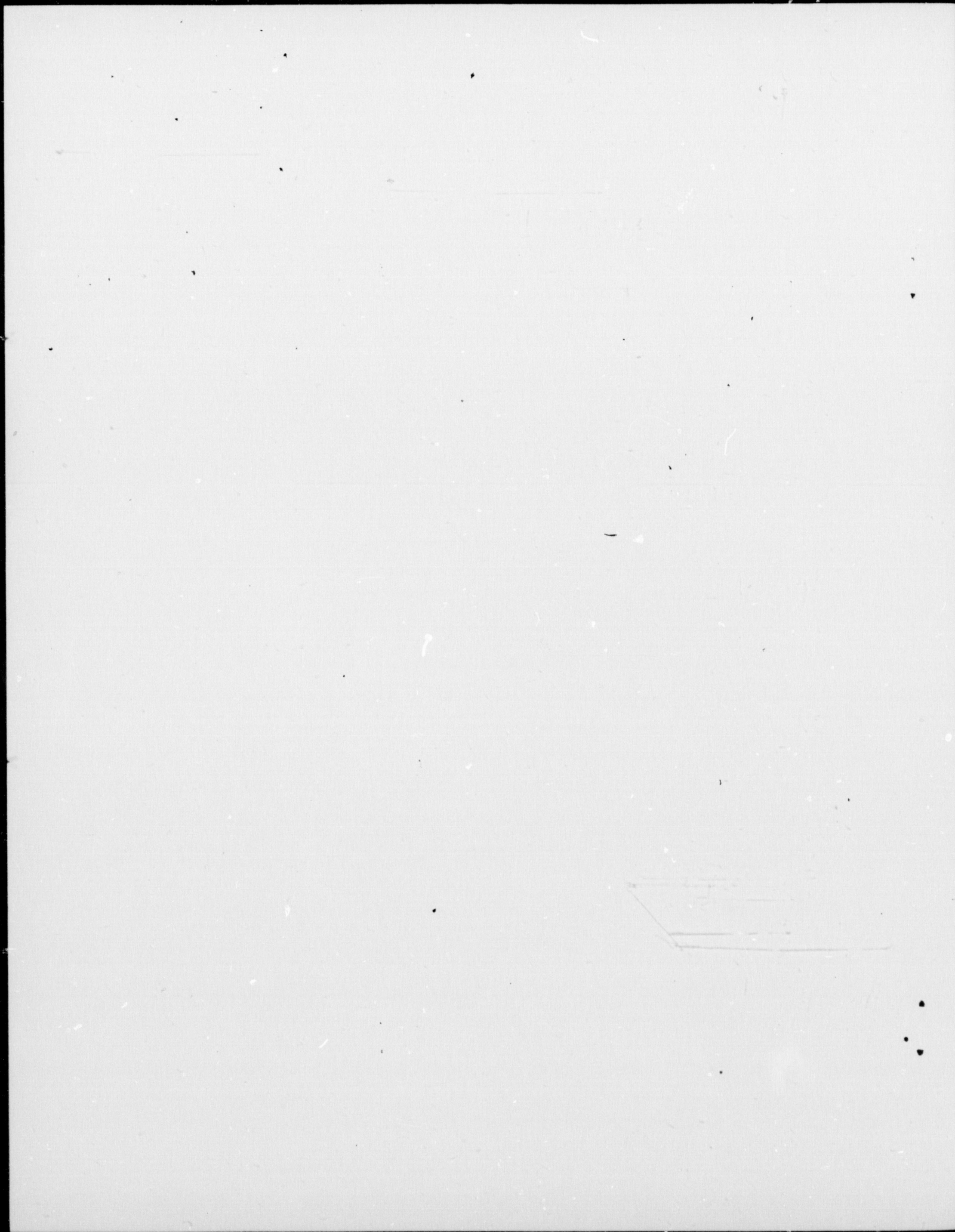
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Certificate of Service

4/28, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Michael A. G.

